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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 670

ADDISON MILLER, A. T. MILLER, AND GEORGE FALTICO, PARTNERS, DOING BUSINESS AS ADDISON MILLER COMPANY, ADDISON MILLER, INC., ET AL.,

vs. *Petitioners,*

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Petitioners,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MAY IT PLEASE THE COURT:

Petitioners, who are defendants in the Complaint show to this Honorable Court:

A.

Summary of the Matter Involved.

July 17, 1941, a complaint was filed in the District Court of the United States for the District of Minnesota by the Administrator of the Wage and Hour Division, United

States Department of Labor, to enjoin violations of the Fair Labor Standards Act by the defendants, jurisdiction of the action being conferred upon the Court by Section 17 of the Act. Pursuant to stipulation between the parties, defendants entered a general appearance, waived service of process and consented to an immediate entry of judgment (R. 13-17).

The judgment filed July 17, 1941 enjoined defendants from violation of the Fair Labor Standards Act and ordered that the stipulation be incorporated in and made a part of the decree. The stipulation required the payment of restitution to employees of defendants based on schedules approved by or prepared by the Administration (R. 10-12).

Motion to vacate the judgment was filed by defendants January 14, 1942 (R. 18-29) showing that the business activities of the defendants, as set forth in the complaint, were such that: (1) subsequent to the consent decree a large number of their employees were, in effect, found to be employees of a carrier as defined by the Interstate Commerce Act (I. C. C. Docket, Ex Parte No. 72 [Sub. No. 1]). This finding being relied upon makes defendants subject to the Railroad Retirement Act (Title 45, U. S. C., Sec. 228 et seq.) and to the Railroad Unemployment Insurance Act (Title 45, U. S. C. Sec. 351 et seq.); and, therefore, exempts the said defendants from the provisions of the Fair Labor Standards Act.

(2) The majority of the employees of defendants, beneficiaries under the judgment, were employed pursuant to collective bargaining agreements made with Railway Labor Unions;

(3) The National Mediation Board (Title 45, U. S. C. Secs. 154 and 155) subsequent to the filing of the judgment, on July 23, 1941, claimed jurisdiction to settle a dispute

between some defendants as carriers and various railroad unions.

(4) If defendants were found to be carriers they would be subject to the Railway Labor Act, the Railroad Unemployment Act and the Carriers Taxing Act of 1937 (Title 45, U. S. C. Sec. 261 et seq.) as well as the Social Security Act and thus be exposed to multiple and inconsistent liabilities.

(5) The Court was without jurisdiction to order payment of restitution in a suit based on the authority of Section 17 of the Fair Labor Standards Act.

(6) The judgment was induced by representations of plaintiff's representatives that defendants were subject to the Fair Labor Standards Act which the defendants believed at the time, and the judgment was entered because of defendants' mistake, inadvertence, surprise or excusable neglect entitling defendants under Rule 60 (b) of the Rules of Civil Procedure to the relief prayed for.

In his Memorandum Order of November 14, 1942, United States District Judge, Matthew M. Joyce, ordered the decree's order to be modified to the extent of relieving the defendants from payment of restitution "Because Section 16 (b) of the Fair Labor Standards Act gives to employees a right to recover their wages and because Section 17 does not expressly permit the recovery of wages in an action brought under Section 17, any incidental powers which the court might have under that section are withdrawn, for when a statute creates a right (liability) and gives a special remedy for its enforcement, that remedy is the exclusive one. Therefore, the Court lacked jurisdiction in this action" (R. 39-54).

The Administrator filed an Appeal in the Eighth Circuit Court of Appeals in June, 1943, and on November 9, 1943,

that Court, through Justice Thomas, reversed the order appealed from (R. 134-141).

In the decision the Court held in substance:

(1) That all errors going to the merits and remedial on appeal are waived by consent to the decree.

(2) That although defendants challenge the jurisdiction of the Court on the ground that the Fair Labor Standards Act does not authorize the Administrator to maintain a suit for restitution of wages that may be due by virtue of any violation of Sec. 15 because such power is granted solely to employees by Sec. 16 (b) of the Act, the inclusion of the order for restitution in the consent decree did not go to the jurisdiction or power of the Court but to the merits only.

(3) The contention that the Administrator lacked authority to maintain an action for restitution because the statute having created a right (a liability) and having given a special remedy for its enforcement, that remedy is exclusive may be sound but it shows only the court erred in rendering the decree.

B.

Reasons Relied Upon for Allowance of Writ.

1. The question of the jurisdiction of the United States District Court to Order, in a consent decree, the payment of restitution of alleged unpaid compensation to employees in an action brought by the Administrator of the Wage and Hour Division, United States Department of Labor under Section 17 of the Fair Labor Standards Act (29 U. S. C. Sec. 201 et seq.) is presented for the first time to this Honorable Court for its review and consideration. This Honorable Court should grant writ of certiorari because it is to the interest of the public, the Government and the Courts that this important question be finally determined.

2. The question whether the jurisdiction of courts of limited jurisdiction and the powers of administrative agencies of the Government may be enlarged through the instrumentality of consent decrees is a matter of public policy which is squarely before the Court in this matter and should be finally resolved and determined.

3. The question whether a previous decision of this Court lays down the rigid rule that consent agreements incorporated in decrees of courts of equity, although they may have been palpably entered into through improvidence, mistake or misunderstanding, are not reviewable in any case requires the clarifying decision of this Court.

4. The holding of the Circuit Court that the inclusion of the order for restitution in the consent decree did not go to the jurisdiction or the power of the Court but to the merits only is in conflict with applicable decisions of this Court and Circuit Courts.

A-4. Ex parte in the *Matter of Lange,* Petitioner, 18 Wall. 163, 21 L. Ed. 872, 879; *United States* v. *Turner,* C. C. A., Eighth Circuit, 47 Fed. (2d) 86, 88; *Windsor* v. *McVeigh,* 93 U. S. 274, 282, 23 L. Ed. 914; *United States* v. *Cooper Corporation, et al.,* 312 U. S. 600, 620, 85 L. Ed. 1071.

5. The holding of the Circuit Court that although the contention may be sound that the Administrator lacked authority to maintain an action for restitution because the statute having created a right (a liability) and having provided a special remedy for its enforcement, that the remedy is exclusive, shows only that the court erred in rendering the decree and in finding at that time that the remedy given the employees is not exclusive, the error pertaining to the capacity of the Administrator, not to the power or jurisdiction of the Court, is in conflict with applicable decisions of this Court.

A-5. *Pollard* v. *Bailey*, 87 U. S. 520, 20 Wall. 520; *Globe Newspaper Company* v. *Walker*, 210 U. S. 356, 20 S. Ct. 726; *Decorative Stone Co.* v. *Building Trade Council*, 23 Fed. (2d) 426, Cert. denied 277 U. S. 594, 74 L. Ed. 1005.

6. The holding of the Circuit Court that the District Court having jurisdiction of the parties and of the subject matter the validity of the judgment, when collaterally attacked, is not affected by an erroneous decision neglects to consider the fact that there was an attack on the jurisdiction of the court showing that the court lacked jurisdiction of the res insofar as restitution was involved and thus could not enter a decree even by consent of the parties that could be pleaded as res adjudicata or be a bar to future suits by those authorized by the statute to bring such action.

A-6. *Valley* v. *Northern F. & M. Ins. Co.*, 254 U. S. 348, 41 S. Ct. 116, 117, 65 L. Ed. 297; *Marietta Chair Co.* v. *Henderson*, 49 S. E. 312; *Supreme Court of Minnesota* v. *Northern Security Company*, 184 U. S. 199, 235, 22 S. Ct. 308, 322, 46 L. Ed. 499; *Bowen* v. *Baker et al.*, 35 Fed. Supp. 852, 855; *Swift & Co.* v. *Hocking Valley R. R.*, 243 U. S. 283, 289, 61 L. Ed. 723; *California* v. *San Pablo Tulare Railroad Co.*, 149 U. S. 308, 314, 37 L. Ed. 747; *Strand* v. *Garden Valley Telephone Co.*, 51 Fed. Supp. 898.

Wherefore, petitioners respectfully pray that writ of certiorari be issued out of and under seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, full and complete transcript of the record of all proceedings in the case No. 12,574, *L. Metcalfe Walling, etc., Appellant,* v. *Addison Miller, et al., Appellees,* and that the decree and judgment of said Circuit Court of Appeals may be reversed by the

Honorable Court, and that your petitioners may have such other and further relief as to this Honorable Court may seem just.

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vs. *Petitioners,*

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, rendered on November 9, 1943, has not been officially reported, but it appears at 12 Law Week, 2284 Sec. 2 (No. 19).

II.

Jurisdiction.

1. The petition for writ of certiorari is applied for under Judicial Code, Section 240 as amended February 13,

1925, C. 229, Sec. 1, 43 Stats. 938, January 31, 1928, C. 14, Sec. 1, 45 Stats. 54, and June 7, 1934, C. 426, 48 Stats. 926 (now section 347), providing in substance that any case, civil or criminal, in the Circuit Court of Appeals be competent for the Supreme Court to require by Certiorari, either before or after judgment, that the cause be certified to the Supreme Court.

2. The Circuit Court's decision was rendered November 9, 1943 (R. 134-141).

3. Consent decree was entered July 17, 1941 (R. 13-17). Defendants filed motion to vacate January 14, 1942 R. 18-29), and on November 14, 1942, the District Court vacated the decree in part and sustained it in part (R. 39-54). The Administrator appealed that part of the order vacated to the Circuit Court of Appeals for the Eighth Circuit and on November 9, 1943 that Court held the District Court was in error and reversed that part of the Order appealed from (R. 134-141).

4. The cases sustaining jurisdiction are as follows: *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489; *Anniston Mfg. Co.* v. *Davis, Collector of Internal Revenue*, 301 U. S. 337.

III.

Statement of the Case.

The summary of the matter involved in the petition contains a statement of the case.

IV.

Specifications of Errors.

1. The Circuit Court of Appeals erred in holding that the inclusion of the order for restitution in the consent decree

did not go to the jurisdiction or power of the court but to the merits only.

2. The Circuit Court of Appeals erred in holding that any error in the District Court's decree pertained only to the capacity of the plaintiff and to the remedy and not to the power of the Court.

3. The Circuit Court of Appeals erred in holding that the order to pay restitution was of the class of suits which the District Court had power to adjudicate under Section 17 of the Fair Labor Standards Act.

4. The Circuit Court of Appeals erred in reversing the District Court, and in holding the District Court was in error in sustaining petitioners' motion.

Argument.

Point A.

The complaint contains no allegation showing jurisdiction of the Court to order payment of restitution, nor can such jurisdiction be inferred from the incidental powers of a Court of Equity.

The only allegation of jurisdiction set forth in the complaint is that conferred upon the Court by Section 217 of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, C. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 et seq.), which is to restrain violations of Section 215 of said Act and in the prayer for relief no demand was made by plaintiff for restitution. The order of the Court contained no consent on the part of the defendants to be enjoined against continuing to withhold wages, nor did the Court's decree contain such restraining language.

In the modified order entered by Justice Joyce he was not only correct in holding that his court lacked statutory

jurisdiction but that the implied powers of an Equity Court could not be invoked. *Mach* v. *Abbott Co.*, 136 Fed. (2d) 7, 10; *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 138, 24 L. ed., 1000; *Decorative Stone Co.* v. *Building Trade Council*, 23 Fed. (2d) 426, Cert. denied 277 U. S. 594, 74 L. ed. 1005.

POINT B.

The Court upon motion of defendants had power to vacate its decree rendered without jurisdiction.

The competency of the court to assume jurisdiction to order payment of restitution in this case was raised on defendants' motion to vacate filed during the same term of court and it was within the power of that court to vacate that decree.

The ruling of the Circuit Court that because the decree was entered by consent and the court had jurisdiction both of the general subject matter and of the parties it was error going to the merits and remedial on appeal and is not open on a motion to vacate is a doctrine subject to many qualifications. This Court stated in *Windsor* v. *McVeigh*, 93 U. S. 274, 282, 23 L. ed. 914:

> "The doctrine invoked by counsel that where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition but like all general propositions, is subject to many qualifications in its application. All courts, even the wisest, are more or less limited in their jurisdiction; * * *"

This case was cited with favor in *United States* v. *Turner*, 47 Fed. (2d) 86, 88, where the court stated that:

> "* * * a judgment may be entirely void, even though the court might have jurisdiction of the parties and of the subject matter."

The principle of law herein involved is adequately stated as follows:

> "The court must stay within the limits of its jurisdiction and power. The correction of wrong decisions when made within the scope of the court's authority is on appeal or other form of direct review, but a wrong or even a correct decision where the court has exceeded its jurisdiction and power is void and may be set aside either directly or collaterally.
>
> "Hence though the court may have acquired the right to act in the cause and been put in possession of full jurisdiction to go ahead and dispose of the issues involved, its judgment in excess of the jurisdiction thus acquired or which transcends the judicial powers which it may rightfully exercise under the law of its organization is subject to collateral attack for want or excess of jurisdiction even though the parties may have asquiesced or consented to the exercise of the jurisdiction which the court assumed to exercise, for no act or volition of the litigants can confer a power upon the court which the law does not authorize it to exercise."
>
> *Freeman on judgments* (5th Ed.), Sec. 354, p. 734-737.

The rights of the parties as between themselves is not here involved—it is the power of the court that is questioned. As was stated in Exparte in the Matter of Lange, Petitioner, 18 Wall. 163, 21 L. ed. 872, 879, ordering the payment of restitution "was error because the power to render any further judgment did not exist". The reason for this rule is sound. Otherwise the well-recognized principle of law that provisions of judgments by consent which are beyond the jurisdiction of the court are not validated by the fact parties consent to the judgment could and would be invalidated. Courts would assume with impunity jurisdiction which is excluded by the laws and statutes.

As in the instant case the District Court's assumption of jurisdiction was in error and could not be cured by con-

sent of the parties. *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62, 24 S. Ct. 598, 48 L. ed. 870; *Chicago, Burlington & Quincy R. R. Co.* v. *Willard*, 220 U. S. 413, 420-421, 31 S. Ct. 460, 55 L. ed. 521; *Valley* v. *Northern F&M Ins. Co.*, 254 U. S. 348, 41 S. Ct. 116, 117, 65 L. ed. 297.

The Circuit Court's ruling that the lower court was in error when it ruled that it was not competent under the facts to order the payment of restitution is clearly inconsistent with authorities cited.

POINT C

Proceeding must conform to the provisions of the statute in pursuing a statutory remedy.

In any proceedings brought under the Fair Labor Standards Act three important elements are involved—the capacity of the plaintiff to bring the action, the applicability of the Act to the particular defendants and the competency of the Court to adjudicate the action instituted.

The Act manifests the action of Congress in a new field. It creates causes of action not theretofore existing. It prescribes specific powers and duties of the Administration Officials, establishes a standard for determining applicability of the Act to given types and classes of employment and declares in clear, concise and understandable language the jurisdiction of the various courts to hear and determine controversies arising out of the Act.

The opinion of the Circuit Court, as delivered by Circuit Judge Thomas, that the lower court was in error in ruling it lacked jurisdiction since "the statute having created a right (a liability) and having given a special remedy for its enforcement, that remedy is exclusive" because the error "pertained only to the capacity of the plaintiff and to the remedy, not to the power of the Court", requires clarification.

In this expression it is shown the Circuit Court has neglected to consider one vitally important fact—that Congress not only declared the Administrator was not authorized to bring such action (*A. H. Belo Corp.* v. *Street, Regional Director of Wage and Hour Law, et al.*, 35 Fed Supp. 430, 432), but coupled such incapacity with a limitation of the jurisdiction of Courts by creating the right and prescribing the remedy. This Court, in *Globe Newspaper Company* v. *Walker*, 210 U. S. 356, 20 S. Ct. 726, stated:

> "It thus appears that Congress has prescribed the remedies it intends to give, this being true 'however inadequate'; as Lord Kenyon said in *Beckford* v. *Hood*, no others can be resorted to. The judgment of the Circuit Court is reversed and the cause remanded to that Court with directions to dismiss the action for want of jurisdiction."

This principle of law is supported by a number of cases including *Pollard* v. *Bailey*, 20 Wall. 520; *Decorative Stone Co.* v. *Building Trade Council*, 23 Fed. (2d) 426, Cert. denied 277 U. S. 594, 74 L. Ed. 1005. The Court here stated on page 427:

> "Courts of equity do not award as incidental relief damages penal in character without statutory authority, as has been frequently held in copyright and patent cases." (Cases cited.)

To disregard the statutory procedure declared by Congress would create discord and disorder in the administration and enforcement of this Act. Courts would be empowered to enter the field of legislation by judicial approval of the consent of parties. As here, defendants are allegedly subject to the provisions of the Fair Labor Standards Act even though several other Governmental Agencies claim jurisdiction of their employees because of the nature of the work performed and are soliciting taxes in addition to those

being paid. By a disregard of statutory procedure and through the instrumentality of consent decrees, the Administrator is determining the rights of persons not parties to the suit nor bound by the court's decision. *Strand* v. *Garden Valley Telephone Co.*, 51 Fed. Supp. 898.

When Congress provided for different types of enforcement in the same Act and established the jurisdiction of the courts as to each type, it drew a plain line of distinction between each and the inference is strong from the history of the Act that the distinction was not inadvertent.

Moreover, the legislative history of the Fair Labor Standards Act is persuasive of the fact that it was the intent of Congress to draw a plain line of demarcation between each type of enforcement under the Act. The Congress considered and refused to combine the two types of enforcement under one procedure.[1]

---

[1] The original Wage and Hour Act was introduced in the Senate by Mr. Black on May 24, 1937 as S. 2475, 75th Congress, First Session, and in the House on the same date by Mr. Connery as H. R. 7200, 75th Congress, First Session.

The original Act provided for a "Board" to administer its provisions but by amendment to the proposed bill on December 17, 1937 the "Board" was abolished and an "Administrator" substituted in lieu thereof.

S. 2475 by Section 21 (a) and (b) provided for "Reparations" to employees if they were underpaid by their employer and under Section 21 (c) the procedure for recovery was established. Section 21 (c) reads

> "Any employee entitled to reparation under this section may recover such reparation in a civil action together with costs and such reasonable attorney's fees as may be allowed by the court. *Any such claim for reparation shall not be the subject of any voluntary assignment, except to the Board as herein provided. At the request or with the consent of any employee entitled to such reparation, the Board or an authorized regional representative of the Board, may take an assignment of any claim of such employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay costs and such reasonable attorney's fees as may be allowed by the Court.*" (Emphasis supplied.)

S. 2475 as reported by Senator Black on July 8, 1937, showed that Section 21 (c) had been renumbered Section 18 (b) and the wording had been changed to authorize the Board or a regional representative to *"take an assignment of any claim of such employee under this section in trust for*

Unless it is plain that Congress intended to afford a judicial remedy it must be assumed that the remedy created by Congress is the only one available.

In Circuit Judge Woodrough's concurring opinion he can "see no good reason why the courts should not award him (the Administrator) their mandatory injunctional order on proof of present unlawful withholding of minimum wages from those to whom the law says they must be paid, as well as injunction against violations threatened to be committed in the future."

This would clearly be the assumption of jurisdiction by the court. The court here did not enjoin defendants from continuance to withhold wages and yet ordered payment of restitution and it is that order of payment which should decide the court did not have jurisdiction, on defendants' motion to vacate a decree which named no persons as parties beneficiary nor set forth stated amounts owing to such parties, nor contained an order of the court "enjoining a continuance to withhold."

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the assigning employee * * *". This is the first draft that provided for "joint actions" by employees entitled to reparations.

Section 13 of this draft authorized the Board (later the Administrator) to bring injunction action to restrain violations.

S. 2475 as passed by the Senate July 31, 1937 had the same wording as reported.

S. 2475 as reported to the House on August 6, 1937 had the same wording as reported.

December 17, 1937 (2d Session) the proposed bill was ordered to be printed showing amendments agreed to in the Committee of the Whole House on the State of the Union and recommitted to the Committee on Labor. Section 18 (b) was changed to 17 (b) and provided for an "Administrator" in lieu of a "Board".

April 21, 1938 reported by Committee on Labor of the House and completely rewritten. Civil and criminal action provided for but action by employees for reparation was stricken from the bill. Nor does the Committee report (H. Rep. 2182) mention reparations or civil action by employees.

May 24, 1938, the bill passed the House without mention of reparations or civil action by employees.

The conference report (H. Rept. 2738) dated June 11, 1938 contains the same wording as enacted into law.

The Circuit Court's decision apparently is based on the erroneous assumption that the Fair Labor Standards Act in creating a private right of action presupposes a continuing right (obligation) in the Administrator.

Section 16 (b) of the Act creates a right and establishes a remedy. It provides for recovery by common law action before a jury at the suit of the offended parties. *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27, 29. *The right of action continues not the violation.*

Under the doctrine of *Pollard* v. *Bailey, supra*, the right of action having ripened the only remedy the court could give was in accordance with the statute. Remedies under Section 17 of the Act are not a substitute for it.

To support any other theory would be to violate the rule expressed by this Court in *United States* v. *Temple*, 105 U. S. 97, 99 (1881) that it is the duty of the Court "to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operations". See also *Moore* v. *United States*, 249 U. S. 487, 489 (1919).

Point D.

The Court lacked jurisdiction of the parties in interest and therefore could not render a binding judgment for restitution which would be a bar to future employee suits. *Brooks et al.* v. *Southern Dairies, Inc.*, 38 Fed. Supp. 588; *Valley* v. *Northern F. & M. Ins. Co.*, 254 U. S. 348, 41 S. Ct. 116, 117; *Swift & Co.* v. *Hocking Valley R. R. Co.*, 243 U. S. 283, 289, 61 L. ed. 723.

In *Rigopoulas et al.* v. *Kervan*, 47 Fed. Supp. 576, 577, the court stated:

> "The fact that an action was commenced against defendant by the Administrator of the Wage and Hour Division and that the action was compromised has no

> bearing on this controversy. That action was for an injunction. The present plaintiffs were not parties to it. Any settlement thereof did not bind these plaintiffs who by the settlement received the difference between the amount of wages actually paid and the amount each would have been entitled to had the employer paid compensation for overtime pursuant to 7(a) of the Act."

In the case of *Strand* v. *The Garden Valley Telephone Company*, 51 Fed. Supp. 898, 905 (September, 1943), the court stated:

> "With reference to the stipulation and judgment entered into in the case between the Administrator and this defendant, the plaintiffs in the instant action were not parties to that suit and are not bound thereby. The schedule of payments approved by the Administrator, and upon which the defendant attempted to make payments or effect settlements with the plaintiffs, is not binding upon the plaintiffs. *The Administrator has no authority, under the Act or otherwise, to compromise the rights or benefits given to employees by the Act itself.*
> "I, accordingly, hold that the plaintiffs have not released the defendant, and that the plaintiffs all come within the meaning of the Fair Labor Standards Act of 1938, and as such are entitled to recover wages and an equal amount of liquidated damages." (Emphasis supplied.)

Ordering the payment of restitution to unknown, unclassified employees in unknown amounts will be "begetting business for another court". The door is left wide open for further litigation. The payment of restitution under a consent decree does not settle the issue raised by the Government and put in controversy by the Bill of Complaint, although it does invite suits from every employee. In such suits, the decree of the court cannot be pleaded as *res adjudicata*.

In *Bowen* v. *Baker et al.*, 35 Fed. Supp. 852, 855, the court held that no one is required to litigate questions which primarily and directly involve issues with third parties not before the court. The court cited the case of *Minnesota* v. *Northern Security Company*, 184 U. S. 199, 235:

> "The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story, Eq. Pl. § 72."

Money paid in restitution is the money of persons not before the court and their right to receive it is not in controversy in this case.

In the case of *The People of the State of California* v. *San Pablo and Tulare Railroad Company*, 149 U. S. 308, the court stated:

> "The duty of this court, as of every jurisdictional tribunal, is limited to the determining rights of persons or of property which are actually controverted in the particular case before it * * * but the court is not empowered to decide moot questions or abstract propositions or to declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge

the power or affect the duty of the court in this regard."

If the court enforced a mandatory injunction requiring the payment of restitution, it would be based upon a question not presented by the complainant and in so doing, the court would of necessity be required to read into Section 17 equitable rights not there stated and, thus, the question passed upon by the court would be moot.

We respectfully submit, for the reason heretofore assigned, that writ of certiorari should be granted by this Honorable Court, so that it may review the decision of the Circuit Court of Appeals and finally reverse it.

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Of Counsel.

No. 670

In the Supreme Court of the United States

OCTOBER TERM, 1946

ADDISON MILLER, A. [illegible]
FALTICO, PARTNERS [illegible]
MILLER COMPANY, A [illegible]
NORTHERN [illegible] COMPANY
LEE, INC. (ILLINOIS) [illegible]

L. METCALFE WALLING, ADMINISTRATOR [illegible]
WAGE AND HOUR DIVISION, [illegible] DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE RESPONDENT [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 670

ADDISON MILLER, A. T. MILLER, AND GEORGE FALTICO, PARTNERS DOING BUSINESS AS ADDISON MILLER COMPANY; ADDISON MILLER, INC.; GREAT NORTHERN ICING COMPANY, AND ADDISON MILLER, INC. (ILLINOIS), PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The "memorandum order" of the district court (R. 39) is reported in 47 F. Supp. 1004. The opinion of the circuit court of appeals (R. 134–142) is reported in 138 F. (2d) 629.

JURISDICTION

The judgment of the circuit court of appeals was entered November 9, 1943 (R. 143). The

petition for writ of certiorari was filed February 4, 1944. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended.

QUESTION PRESENTED

In a suit by the Administrator of the Wage and Hour Division, under Section 17 of the Fair Labor Standards Act, the district court entered on consent of all parties a decree restraining violations of the Act and requiring petitioners to pay restitution to their underpaid employees. The question is whether the provision ordering restitution was void for lack of jurisdiction.

STATUTE INVOLVED

The statutory provision involved is Section 17 of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 217. The pertinent part of this section provides—

> The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown * * * to restrain violations of section 15.

STATEMENT

In July 1941 the Administrator of the Wage and Hour Division, United States Department of Labor, filed a complaint in the district court (R. 1) to enjoin petitioners from violating the Fair Labor Standards Act. Pursuant to stipulation

between the parties, the petitioners entered a general appearance, waived service of process and consented to the immediate entry of a judgment (R. 10–12). This stipulation and consent contained an agreement by petitioners to pay restitution to employees for previous failure to compensate them in accordance with the Act (R. 10–12). At the time of the entry of judgment the court made specific inquiry of petitioners' counsel to ascertain whether all the petitioners had been fully advised of the nature and purpose of the judgment and whether their assent was given with full understanding of what was required of them (R. 36). Counsel replied that the matter had been discussed at several conferences, and that they were "fully familiar with the obligations of the Stipulation" (R. 36). Accordingly, the district court entered a judgment which restrained violations of the Act and directed that the stipulation between the parties be incorporated in and made a part of the judgment, and that "defendants [petitioners] do and perform each and every act and thing set forth in said stipulation" (R. 16).

On January 14, 1942, petitioners filed a motion to vacate the consent judgment entered July 17, 1941 (R. 18). Petitioners urged a number of grounds for vacating the judgment (R. 40), chief among which was that the court lacked jurisdiction in a suit by the Administrator to order restitution

of wages due under the Act (R. 26). Holding that it "had jurisdiction over the general subject matter of the action and of the parties to it" (R. 53), the district court denied the other relief requested by the petitioners, but vacated that part of the judgment which directed the payment of restitution.

Respondent then appealed from the order modifying the judgment entered July 17, 1941 (R. 55). Petitioners did not appeal from the portions of the order adverse to them (R. 136). Consequently, the only question before the circuit court of appeals was whether the district court erred in modifying the consent judgment on the ground that it lacked jurisdiction to grant restitution.

The circuit court of appeals concluded that the district court, at the time the consent judgment was entered, had general jurisdiction of the subject matter and of the parties (R. 137), and that even if the Administrator were not authorized to maintain a suit for restitution, the "inclusion of the order for restitution in the consent decree did not go to the jurisdiction or power of the court but to the merits only" (R. 138). The court held that the question whether the Administrator "has the requisite standing" to obtain such relief goes "only to the capacity of the plaintiff and to the remedy, not to the power of the court" (R. 141). Accordingly, the court reversed that part of the order of the district court which vacated the provision for restitution.

ARGUMENT

If a court has jurisdiction of the general subject matter and the parties, a consent decree may not be set aside for ordinary errors of law or "error in decision"; and "even gross error in the decree" is no cause for vacating it. *Swift & Co.* v. *United States,* 276 U. S. 311, 330. A consent "decree * * * is always affirmed, without considering the merits of the cause." *Nashville Ry. Co.* v. *United States,* 113 U. S. 261, 266, quoted with approval in the *Swift* case at page 324.[1] The reason is that errors in decisions are "waived by the consent to the decree" (*Swift* case, pp. 327, 331).

This rule governs the instant case. The question whether the Administrator may secure, in addition to an injunction restraining future violations, an order directing the defendant to make restitution to employees of back wages due under the Act does not go to the jurisdiction of the court. Jurisdiction is, of course, a word of variable meaning. In the *Swift* case the Court held that a consent decree could not be set aside because of error if the district court "had jurisdiction both of the general subject matter—enforcement of the Anti-Trust Act—and of the

[1] This principle applies whether the attack is by motion to vacate as in the *Swift* case, or by an appeal or bill of review. In the *Nashville Ry.* case, 113 U. S. 261, this Court ruled that a consent decree could not be reversed on the merits on appeal. To the same effect see *Thompson* v. *Maxwell,* 95 U. S. 391, 397, holding that a bill of review will not lie against a consent decree.

parties" (276 U. S., at 326). The question was raised in that case as to the existence of a case or controversy, an issue undoubtedly going to the Court's "jurisdiction" under Article III of the Constitution; yet an erroneous ruling on that point was held to be correctible "only by an appeal or by a bill of review" (*ibid.*). In the present case petitioners' appearance and consent to the entry of the decree conferred jurisdiction over the parties, and the court also had jurisdiction over "the general subject matter", the enforcement of the Fair Labor Standards Act.

Petitioners' present contention that the decree entered in the exercise of this jurisdiction was too sweeping does not present a jurisdictional question. The restitution remedy, if not literally within the power "to restrain violations,"[2] is certainly sufficiently related to the restraint of violations to be an exercise, even if erroneous, of the power to enjoin. The *Swift* case itself demonstrates[3] that questions as to the scope of a

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[2] In his concurring opinion below, Judge Woodrough took the position that "the violation continues as long as they [the employers] continue the withholding and refusal to pay according to law" for past workweeks. Hence, he concluded, the inclusion of the restitution provision in the consent decree was not erroneous. (R. 141–142.) See to the same effect *Fleming* v. *Alderman*, 51 F. Supp. 800 (D. Conn.). For the reasons stated in the text, we believe it unnecessary for the Court to pass upon this question.

[3] Thus, in the *Swift* case it was contended that the decree applied to intrastate transactions, and that since there was no finding as to their relationship to interstate commerce,

decree are not jurisdictional, for the court there stated that "The power to enjoin includes the power to enjoin too much" (*id.*, at 331).

The essence of petitioners' argument is that the Administrator has no standing in an injunction suit to seek restitution of amounts due employees under the Act. The contention is that since Section 16 (b) authorizes employees to sue for damages, the provision in Section 17 empowering the district courts to restrain violations at the suit of the Administrator (see Sec. 11 (a)) cannot be construed as authorizing an order of restitution. But if this point had been contested in the present suit, the district court undoubtedly would have had jurisdiction to decide whether only the employees, and not the Administrator, could sue for restitution.[4]

General Investment Co. v. *New York Central R. R.*, 271 U. S. 228, is directly in point. There a stockholder was suing to enjoin a railroad consolidation as in violation of the antitrust laws. The district court held that various sections of the antitrust laws and the Interstate Commerce Act lodged the right to maintain such a bill

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that portion of the decree was a nullity (pp. 330–331), and that the decree was too comprehensive in that it enjoined defendants from engaging in conduct not prohibited by the Anti-Trust Act (pp. 328–330).

[4] It should be noted that the simple restitution of unpaid wages required by the decree is not the equivalent of the remedy in Section 16 (b), which permits employees to recover double damages as well as attorneys' fees.

exclusively in the public authorities, and dismissed the bill for want of jurisdiction (271 U. S., at 231). This Court held that such questions "pertain to the merits, not to jurisdiction" (*ibid.*), and stated (pp. 230–231):

> By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits (*The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25; *Geneva Furniture Co.* v. *Karpen*, 238 U. S. 254, 258,) *as where the plaintiff seeks preventive relief against a threatened violation of law of which he has no right to complain*, either because it will not injure him or *because the right to invoke such relief is lodged exclusively in an agency charged with the duty of representing the public in the matter.* Whether a plaintiff seeking such relief has *the requisite standing* is a question going to the merits, and its determination is an exercise of jurisdiction. *Illinois Central R. R. Co.* v. *Adams*, 180 U. S. 28, 34; *Venner* v. *Great Northern Ry. Co.*, 209 U. S. 24, 34. [Italics supplied.]

In the *General Investment* case the argument was that specific statutory remedies given the public authorities deprived a private person of standing to sue. Here the contention is the con-

verse. But this difference is obviously inconsequential insofar as the jurisdictional nature of the question is concerned. In both cases the issue is whether the plaintiff has "the requisite standing" (271 U. S., at 230), not whether the subject matter of the case or the type of relief is within the power of the court. Hence, in the instant case the inclusion of the restitution provision was at most an erroneous exercise of the jurisdiction which the court possessed. See also *Chicot County Dist.* v. *Bank,* 308 U. S. 371; *Illinois Central R. R. Co.* v. *Adams,* 180 U. S. 28; *Venner* v. *Great Northern Railway,* 209 U. S. 24; *Foltz* v. *St. Louis and S. F. Ry. Co.,* 60 Fed. 316 (C. C. A. 8); *Brougham* v. *Oceanic Steam Navigation Co.,* 205 Fed. 857 (C. C. A. 2); *Thompson* v. *Terminal Shares,* 89 F. (2d) 652 (C. C. A. 8); *Montgomery* v. *Equitable Life Assur. Soc.,* 83 F. (2d) 758 (C. C. A. 7).

The cases cited by petitioners are clearly inapposite. Not one of them presented the question of the validity of an unappealed or consent judgment. In *Globe Newspaper Co.* v. *Walker,* 210 U. S. 356, this Court held that the copyright statutes grant no right to recover damages for infringement of the copyright of a map and therefore that the action was not one which "arose under the copyright laws of the United States, whereof the Circuit Court * * * had jurisdiction" (210 U. S., at 361). Accordingly, the

judgment of that court awarding damages was reversed and the action ordered dismissed "for want of jurisdiction," 210 U. S., at 367. But the jurisdiction which was wanting in the *Globe* case was jurisdiction of the trial court as a federal court, not jurisdiction of the general subject matter or the parties. The judgment there would not have been subject to collateral attack if unappealed. Want of federal "jurisdiction," like other errors of law or decision, does not render a district court's judgment void.[5] Moreover, because of Sections 16 and 17 of the Act, the present action, unlike the *Globe* suit, was unquestionably one within the jurisdiction of the federal district courts. The other decisions cited by petitioners are even further afield.

The cases under the Fair Labor Standards Act are in accord with the decisions below. They hold that judgments requiring the payment of restitution to underpaid employees may be enforced by punishing for contempt employers who have failed to make such payments in accordance with the court's decree. *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622 (C. C. A. 7); *Fleming* v. *Alderman*, 51 F. Supp. 800 (D. Conn.).

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[5] *Chicot County Dist.* v. *Bank*, 308 U. S. 371, 376, which quotes *McCormick* v. *Sullivant*, 10 Wheat. 192, 199, as follows: "If the [federal ground of] jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities."

CONCLUSION

The decision of the circuit court of appeals is in accord with the applicable decisions of this Court and with pertinent decisions of other circuits. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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